

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

77-1340

To be argued by
STEVEN LLOYD BARRETT

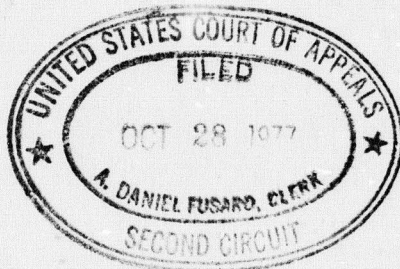
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA, :
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Plaintiff-Appellee, :
:
-against- :
:
JOSEPH JOYCE, :
:
Defendant-Appellant. :
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-----X

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P/S
Docket No. 77-1340

BRIEF FOR APPELLANT

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK



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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

-against-

JOSEPH JOYCE,

Defendant-Appellant.

Docket No. 77-1340

BRIEF FOR APPELLANT

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

QUESTIONS PRESENTED

1. Whether the evidence was insufficient to support the inference that appellant Joyce, a salesman in a corporation which operated in a fraudulent manner, had knowledge of the fraudulent scheme and was a knowing participant.
2. Whether appellant Joyce was deprived of a fair trial by the prosecutor's effort to depict him as a "con man" through

unsubstantiated charges of similar misconduct and improper argument designed to prove criminal propensity.

3. Whether the court's failure to explain the meaning and evaluation of circumstantial evidence in its jury charge constituted plain error.

STATEMENT PURSUANT TO RULE 28(a)(3)

PRELIMINARY STATEMENT

This is an appeal from a judgment of the United States District Court for the Eastern District of New York (The Honorable Jack B. Weinstein), rendered July 20, 1977, convicting appellant Joseph Joyce, after a jury trial, of three counts of mail fraud (18 U.S.C. §§1341 and 2) and one count of interstate transportation of a fraudulently obtained check (18 U.S.C. §§2314 and 2). Appellant was sentenced to concurrent sentences of five years; pursuant to 18 U.S.C. §3651, he was ordered to serve six months in prison and four and one-half years on probation. An application for a stay of execution of sentence was denied in the district court, and appellant is currently serving that sentence.

By order of this Court, The Legal Aid Society, Federal Defender Services Unit, was continued as counsel, pursuant to the Criminal Justice Act.

STATEMENT OF FACTS

A. The Indictment

Appellant Joseph Joyce was charged in a six-count superseding indictment with mail fraud and interstate transportation of a fraudulently obtained check. Joseph Joyce, the indictment recited, was a salesman for Mackey Distributors, Inc., while the other four named participants in the scheme -- Jerome Mackey, Richard Taylor, William Nelson, and Lester Fisher -- occupied managerial positions -- President, Vice-President, Secretary-Treasurer, and Sales Manager of the corporation, respectively (§§1-6). The components of the scheme, as detailed in the indictment (§§8-12), described the workings of the fraudulent scheme, but did not attribute specific roles or acts to any of the five named participants.

Counts One, Two, and Three, naming all the participants, charged the mailing of advertisements which appeared in newspapers and were a material part of the fraudulent scheme. Count One pertained to an advertisement mailed to The Boston Globe on August 24, 1972; Count Two, to an advertisement mailed to The Utica Press on September 9, 1972; and Count Three to an advertisement mailed to The Philadelphia Inquirer on October 1, 1972. The three counts charged violations of 18 U.S.C. §§1341 and 2.

Counts Four and Five named only Mr. Joyce, and related to his causing to be mailed to Mackey Distributors checks which

were obtained through the fraudulent scheme. Count Four involved the mailing of a check by Mr. Paul Suk from Quincy, Massachusetts, on September 14, 1972; Count Five, the mailing of a check by Mr. Thomas Connor from New York Mills, New York, on September 28, 1972. These two counts also charged violations of 18 U.S.C. §§1341 and 2.

Count Six named Mr. Joyce alone, and charged him with transporting in interstate commerce, on or about October 26, 1972, a certified check for \$10,100, payable to Mackey Distributors, drawn in Philadelphia, Pennsylvania, and delivered to Hempstead, New York; the check was allegedly obtained through the fraudulent scheme. This count charged a violation of 18 U.S.C. §§2314 and 2.

B. The Government's Trial Evidence

Mr. Joyce travelled from city to city making sales presentations for Mackey Distributors from a motel room. Potential customers were sought through newspaper advertisements placed by the corporation in local papers. Alan Nelson, President of F&N Advertising Corporation, was hired by Mackey Distributors to place these advertisements in various newspapers (T.84*). Mr. Nelson testified that the following were among the newspapers in which advertisements were placed for Mackey Distributors: The Boston Globe, order mailed on August 24, 1972, to

*Numerals preceded by "T" in parentheses refer to pages of the trial transcript. Trial witnesses are indicated by underscoring at the first mention of their testimony.

be published on September 8 or 9, 1972; The Utica Press, order mailed on September 9, 1972, or October 9, 1972, to be published on October 27, 1972; and The Philadelphia Inquirer, order mailed on October 5, 1972, to be published on October 15, 1972 (T.87-89).* Mr. Nelson testified that he had never previously seen Mr. Joyce, and had received no communication directly from him (T.89).

The Government presented the testimony of four people who had signed contracts with Mackey Distributors for tapes and display cabinets after speaking with Mr. Joyce.**

William M. Melleody noticed an advertisement in the October 8, 1972, issue of The Philadelphia Inquirer (T.22). The advertisement indicated that Mackey Distributors would provide major label and top artist tape recordings to the customer; Mackey Distributors would also provide various services to assist the customer's resale operations, such as providing display cabinets and "locators" who would assist in choosing appropriate retail

*Most, if not all, of these dates were close approximations rather than exact dates (T.90). Mr. Nelson indicated that advertisements such as those placed by Mackey Distributors had to be cleared by an acceptance committee before they would be published; this required the mailing of the corporation's financial statement and references, a complete credit report, and the names and addresses of individuals in the corporation (T.90-91).

**It was also stipulated that 13 other persons, whose sales agreements and purchase orders were offered in evidence, would testify that Mr. Joyce made to them statements similar to those disclosed by the testifying customers in their contract discussions (T.100-101).

locations. Mr. Melleody contacted Mr. Joyce at the Holiday Inn listed in the advertisement, and later proceeded to Mr. Joyce's room, where they discussed the arrangements.

Mr. Melleody recalled that there were posters on the wall showing major label and top artist tapes and a "good quality" display cabinet containing several major label and top artist tapes (T.24). Mr. Joyce was described by the witnesses as having been "very gracious" and "very congenial," using a "soft sell" in "the very relaxed atmosphere" (T.24-25). Mr. Joyce began by discussing Jerome Mackey, President of Mackey Distributors. Jerome Mackey was described as a brilliant businessman who had started Jerome Mackey Judo Schools, a highly successful business operation, and Mackey Distributors was said to be a wholly-owned subsidiary of Jerome Mackey Judo Schools (T.25-26). During their two and one-half hour discussion, Mr. Joyce produced a number of documents, including a balance sheet for Mackey Distributors (T.26).

Mr. Joyce also provided Mr. Melleody with a list of references which included Linda Barclay, Maryann Brosley, and Rachel Dallis Macoe. These references were described as previous customers who were successful, and Mr. Joyce implied that he had sold tapes to Linda Barclay. When Mr. Melleody called these references, they stated that they knew Mr. Joyce (T.28-30). Mr. Joyce's sales talk included some discussion concerning the best locations for the individual display outlets (T.31-32), projected income statistics (T.33-34), the documented

strengths of the stereo tape industry (T.36), the financial status of the parent company (Jerome Mackey Judo Schools) (T.37), and relocation arrangements in the event of poor sales (T.34). Mr. Joyce indicated that the source of several of his representations was Richard Taylor, the corporation's Vice-President, and he attributed the feature of major label and top artist tapes to Mr. Taylor's expertise (T.32). Mr. Melleody recalled that upon leaving, Mr. Joyce characterized his customers as "an alumni association" (T.30).

Mr. Melleody expressed interest in 40 locations, and the cost was given as \$9,500 (T.27). During the next two weeks, Mr. Melleody raised cash, and on October 26, 1972, he signed a contract with Mr. Joyce and presented him with a check for \$10,100 (the difference covering an additional 200 tapes) (T.40). At this time, Mr. Joyce told Mr. Melleody that he could expect the locators to begin their work and the tapes and cabinets to arrive within three weeks, although he warned that there might be a slight delay (T.40). Mr. Melleody telephoned for Mr. Joyce at the New York office of Mackey Distributors on October 30 to inquire whether his check had been received and deposited; he was advised that Mr. Joyce was not in, but was assured that the check had been received and deposited (T.48).

Neither the locators nor the merchandise arrived, although Mr. Melleody made numerous attempts to secure what he had been promised. His efforts to reach Mr. Joyce by telephone at the New York office were unsuccessful, and Mr. Joyce never returned

his calls (T.49). On November 22, and again on November 26, he was told by the receptionist in New York that his merchandise had been shipped, but this information proved incorrect (T.49-50). On December 5, he attempted to reach Richard Taylor, the Vice-President, but spoke instead to a Mr. Weber, who advised him that the office had suffered a crisis. That crisis, Mr. Melleody learned later that week from William Nelson, the Secretary-Treasurer, was Richard Taylor's theft or mismanagement of \$300,000, but again, Mr. Melleody was assured that the tapes and cabinets would be sent in the near future (T.50-51). Another promise was made by William Nelson on December 15 for delivery in early January, and on January 2, a Mr. Neener offered a new plan in which Mr. Melleody would receive his 40 locations in Kansas, with a lower profit margin than had been promised in his discussions with Mr. Joyce (T.53-55).

Throughout this entire period, Mr. Melleody was unable to reach Mr. Joyce through the New York office, and had no contact with Mr. Joyce. He acknowledged that he was aware from his discussions with him that Mr. Joyce conducted his business by traveling from city to city (T.60). Mr. Melleody noted that during the two weeks preceding the signing of the contract, he had inquired as to the reputation and record of Mackey Distributors by contacting the Better Business Bureau of New York and the Better Business Bureau of Long Island, both of which were "non-committal" but apparently satisfied him (T.63-64). He also spoke to a Max Feinstein, an accountant who was auditing the

corporation, and to Mr. Joyce, who stated that Mackey Distributors was "doing business" and that he was "satisfied with the progress" (T.64-65). Mr. Melleody recalled that on one occasion, Mr. Joyce had remarked that he had grown tired of salesmanship and intended to set up 50 tape resale locations for himself (T.50).

Paul Suk, of Quincy Massachusetts, was another victim of the corporation. Mr. Suk testified that in September 1972 he read and responded to an advertisement in The Boston Globe for Mackey Distributors, Inc., by contacting Mr. Joyce (T.66-67). The two met at Mr. Joyce's Holiday Inn room, and in their "fairly lengthy" discussion, Mr. Joyce provided a variety of printed materials, represented that the merchandise provided would be the exact cabinet displayed and tapes of "first line quality, normally selected from the top one hundred listing in Billboard," and offered a list of references drawn from successful customers (T.68-72).

Mr. Suk signed a contract then and there, and an addendum to the contract provided for 300 backup tapes which were to be selected from the top ten current Billboard listings (T.73-74). Thereafter, Mr. Suk mailed a cashier's check for \$5,650 directly to Mackey Distributors (T.75-76). Of the 1,100 tapes he ordered, he received 800; of the 20 cabinets he ordered, he received four. The quality of both the tapes and the cabinets was less than agreed upon (T.76-78). A locator from Mackey Distributors contacted Mr. Suk before he received the cabinets and tapes, but

after the merchandise arrived, no locator was made available (T.82-83). Mr. Suk recalled that he had telephoned the Better Business Bureau before mailing his check, and that the Bureau reported no complaints against Mackey Distributors (T.80).

Joanne Connors, of New York Mills, New York, testified that she read an advertisement for Mackey Distributors in The Utica Observer Dispatch in September 1972 and, with her husband, drove 90 miles to Albany on September 17 for an appointment with Mr. Joyce (T.92-93). As had the previous witnesses, Ms. Connors indicated that Mr. Joyce provided information about Mackey Distributors and Jerome Mackey Judo Schools, a variety of materials regarding the stereo tape industry's potential for growth, and a list of references (T.94).

Ms. Connors called the Better Business Bureau, which appeared on Mr. Joyce's reference list, and was told that there were no unfavorable complaints recorded against Mackey Distributors (T.96). Her husband, whose testimony was stipulated, called one of the individual references listed and received a favorable comment (T.96, 99). Ms. Connors' husband also signed the contract, filled out several forms concerning his financial situation, and drew a check for \$2,225, which Ms. Connors mailed to Mackey Distributors (T.97-98). Ms. Connors did not testify that the contract provisions were not fulfilled by Mackey Distributors.

Martin Bovey, a resident of Boston, Massachusetts, in 1972, read an advertisement in The Boston Globe at the end of August

and contacted Mr. Joyce. They met at Mr. Joyce's Holiday Inn room; Mr. Joyce was "very cordial, friendly and professional," and the room displays were of the most popular performers, which in conjunction with the newspaper advertisement, indicated to Mr. Bovey that major label and top artist tapes were being offered (T.233-234). At this time, Mr. Bovey was self-employed in the sale of tapes, but was dissatisfied with the distributor with whom he was associated because he was being supplied with copies and cut-outs rather than first quality tapes (T.235).* Mr. Bovey's bad experience with his distributor had led him to a careful study of the stereo tape market, and the quality of the tapes to be delivered by Mackey Distributors was the matter of greatest importance to him as he discussed contract provisions with Mr. Joyce (T.236-237). Since the contract did not specifically address all the quality considerations of the tapes, Mr. Bovey sought an addendum to the contract covering these details, to which Mr. Joyce agreed after it had been approved by the New York office (T.240-243). This addendum, which according to Mr. Bovey did no more than restate the details of his discussion with Mr. Joyce, was an assurance that only first quality tapes, and no copies or cut-outs, would be provided (T.244-245).

*"First quality tapes" refer to the current products issued by the major recording companies. "Copies" or "duplicates" are tape recordings made by copying the original tapes, issued by the major recording companies, and are considered inferior to the original product. "Cut-outs," though major label tapes, are discontinued tapes that are no longer current and are bought at a discount (T.235-236, 248-251).

The contract was signed, but the first delivery of 10 cases was of lesser quality merchandise: the cabinets were different and many of the tapes were copies or cut-outs (T. 246). All of Mr. Bovey's complaints were directed to Vice-President Richard Taylor, with whom Mr. Bovey spoke frequently, but he never received the desired items or a refund of his money (T.247). As for his impressions regarding Mr. Joyce, who had told him that "he believed in the company, believed in the opportunities for him[self] and believed in the opportunities for others" (T.239), Mr. Bovey expressed his opinion in the following colloquy:

Q. When you talked to Mr. Joyce did you get the impression that he was sincere and honest?

A. Yes, I did.

Q. And that he believed in the product?

A. Yes.

Q. And he believed in everything that he had said?

A. I thought he was a very professional person, yes.

(T.254).

The Government also presented the testimony of two officials of the corporation who admitted, directly or implicitly, some role in conducting the questionable business methods of Mackey Distributors.

Richard Taylor, the Vice-President, a founder, and a one-third partner in the company, gave testimony in consideration

for a reduced plea (T.8, 102-104). He stated that Mackey Distributors was set up on April 19, 1972, to do a legitimate business in stereo tapes; the company intended to sell duplicated tapes (copies) which, to his knowledge, was legal (T. 130-131). Jerome Mackey provided the sole capitalization of \$5,000, and no capital was ever added; the company's current expenses were financed, in effect, with the receipts of future deliveries (T.125). Concededly, several provisions of the sales contract were viewed with less than serious commitment: Mr. Taylor admitted that the "professional locators" were untrained and compensated at \$15 per cabinet installed, and that there was no genuine intention to honor the buy-back clause of the contract (T.124-125, 129). But the most flagrant misconduct was attributed to Lester Fisher. Mr. Fisher was hired as sales manager in late July or early August, and among other innovations, he instituted a network of "singers," people who would give favorable comments for pay, which included his wife operating under her maiden name, Rachel Green (T.110-113, 139-140). By far the most significant change in business was in the nature of its advertising; whereas the company continued to sell duplicate tapes and cut-outs, it began advertising major label tapes (T.111, 131-132, 139). Mr. Fisher was brought in because the company was not earning much money; Mr. Taylor recommended him to Mr. Mackey as a person who was apt to make significant misrepresentations "to people in the field" -- apparently this was viewed as a positive trait -- and in fact

Mr. Taylor acknowledged that he had used the description "congenital liar" with regard to Mr. Fisher "many times" (T.136-138).

While Mr. Taylor claimed that he was not tainted by illegal motives when the corporation was formed, he soon adapted to the changes. Two months before Mr. Fisher joined the staff, Mr. Taylor had begun taking complaints, which generally related to the choice of locations; after Mr. Fisher instituted his "advertising" change, Mr. Taylor continued to handle complaints, and he was aware that the nature of the complaints had changed to dissatisfaction with the products delivered and extended to every customer of the corporation (T.135, 163-164). It was Mr. Fisher who instituted the phony reference list which was handed to the salesmen, but Mr. Taylor had provided at least one of the names on the list (T.140). On September 22, 1972, and thereafter, two corporations formed by Mr. Taylor and a Dallas McCoy -- B&G Sales and MTM, Inc. -- became the sources of the tapes sold to Mackey Distributor's customers, and all profits from these sales went to Mr. Taylor and Mr. McCoy, although Mr. Taylor retained his position at Mackey Distributors (T.149-152). Mr. Taylor attributed the corporation's financial failure to "expenses," and one of the major expenses was advances to salesmen; the witness admitted giving such advances to his brother and son, who had been brought in as salesmen, but he did not know whether Mr. Joyce had ever received such an advance (T. 154-155). Mr. Taylor's own salary was \$1,500 per month, and in addition he received travel expenses and had his withholding

tax (\$894 per month) paid out of corporate funds (T.152).

Mr. Joyce did not figure prominently in Mr. Taylor's testimony. Prior to starting Mackey Distributors, Mr. Taylor had been a salesman associated with various companies, as had Mr. Joyce, and their paths had crossed (T.114-117). At Mackey Distributors, Mr. Taylor's contact with Mr. Joyce was minimal: he recalled one telephone call and one meeting (T.135). The telephone call was on September 15, 1972, and concerned the order for 300 backup tapes -- apparently that of Paul Suk -- consisting of top ten current Billboard listings. Mr. Taylor remarked that "I thought he knew better than this, that we wouldn't deliver this type of merchandise," and he advised Mr. Joyce, "If you ever do it again, I'm going to take it out of your commission" (T.127-128). Mr. Taylor had no recollection of any response by Mr. Joyce (T.128). The first and only meeting he had with Mr. Joyce was at the end of November 1972 (T.107), at which time he advised Mr. Joyce that he felt that the company "was going down the drain" and announced his intention of leaving its employ (T.166-167).

Mr. Taylor's testimony indicates that much of the sales presentation used by the salesmen was prescribed by him or the corporation. It was he who formulated the sales "pitch" to be used by the salesmen (T.106-108), and the "pitch book" -- the various materials used in the sales presentation -- was prepared and printed by the company for all the salesmen (T.141-142). The list of references which was distributed by the

salesmen was issued by the officers: Mr. Fisher, with Mr. Taylor's assistance, compiled the "singers" for the list; Mr. Taylor arranged for the registration with the Better Business Bureau and its inclusion on the reference list; and Mr. Mackey, the President, furnished a bank reference (Mr. Bellerista, Vice-President of Franklin National Bank), a lawyer (Paul Belloff), and an accountant (Max Feinstein) for the reference list (T.144-145, 164-165). The display cabinets and the major label and top artist tapes which were used in all sales presentations were provided by Mackey Distributors (T.143-144).

Lester Fisher testified under a grant of immunity (T.168).* He maintained his innocence in two ways: he explained that the representations of his salesmen (which he dictated) were not inaccurate but that the corporation was at fault for failing to implement these obligations; and he contended that the prescribed representations were not technically untrue -- though they were obviously intended to be misleading. Thus, after having advertised the sale of first quality tapes and display cabinets and the availability of professional locators, he disclaimed any responsibility for the shipping of tapes, the purchasing of cabinets, and the deployment of qualified locators (T.204-206). And as to the pitch to the customers, Mr. Fisher performed the following verbal gymnastics:

*After leaving Mackey Distributors, Mr. Fisher formed the Piedmont Distributing Company. He was subsequently indicted for fraud in connection with that operation, and pleaded guilty to a lesser crime (T.180-181).

Q. And did you tell the prospective customer that he was going to get a hundred percent major label tapes?

A. I pitched major labels.

Q. That's what you told the customer?

A. Yes, sir.

Q. That's what you told the salesman?

A. Yes, sir. I pitched it all the same way.

Q. Everybody, major label tapes?

A. Yes.

Q. What were you telling them?

A. I told the customers, they [the salesmen] heard me what I would tell the customer. They would get major label tapes.

Q. But you really didn't mean to say that you were going to give the major label tapes when you told the customer he was going to get that?

A. That was up to the company.

Q. Didn't you state earlier --

A. Yes. I said they were supposed to get ten major labels. The rest would be cut out, and all this I didn't tell the customer this, no.

Q. What was the salesman supposed to tell the customer?

A. He was supposed to tell him what he heard me say.

Q. A hundred percent?

A. It didn't say hundred percent. You just led him to believe that. You didn't actually say that.

(T.200-201).

One of Mr. Fisher's major functions was the hiring and training of salesmen (T.169). Mr. Fisher hired Mr. Joyce, who was introduced to him by Mr. Taylor, as well as six other salesmen (T.188, 196-198). The salesmen were trained primarily by observing Mr. Fisher pitch a customer,* and the salesman was told to provide the same information in his sales presentations; Mr. Fisher was unsure whether Mr. Joyce had been so trained (T. 200). Additionally, the materials in the pitch book and the background of the corporation were discussed with each of the salesmen (T.191-192). Various company policies, such as not to contact a customer after a sale but to direct him to the main office, and to require "hard money" -- certified or cashier's check-- were given to the salesmen (T.205, 219-220). Mr. Fisher's responsibilities also included the placing of advertisements for the company in local newspapers. In this function, he operated under the name Lester Hardy (Hardy is his middle name) to allow him to screen incoming calls from customers (T.221-222). In addition to this work, he conducted his own sales, and he received a 25 percent commission, which augmented his five percent commission on all salesmen's sales and full travel and business expenses incurred by him in his sales work (T.190-193). Mr. Fisher, who was "into making money" (T.193), was "not sure" of his income while at Mackey Industries; while he mentioned a

*In his testimony, Mr. Fisher described his own pitch and some of the considerations and strategies which were part of his presentation (T.224-227).

possible figure of \$18,000, counsel noted that the record indicated "a tax of over \$22,000" (T.214-215). The salesmen all received a 20 percent commission on their own sales; there was no salary, and all expenses -- travel, motel rooms, food, etc. -- were their own investment, not, as in Mr. Fisher's case, reimbursed by the company (T.190, 209).

Mr. Fisher acknowledged a keen interest in the success of his salesmen due to his five percent commission on their sales (T.193), but when he suggested that his salesmen shared with him the knowledge that their sales were facilitated by fraudulent representations, his testimony was sharply questioned. He was "sure" the salesmen knew that the singers were not genuine customer references because "all of them met my wife;" but he was forced to admit that her inclusion on the reference list ("Rachel Green") was under her maiden name and that she had been introduced to all the salesmen as "Rachel" (T.202-203). Mr. Fisher also testified that he told the salesmen that "there would be ten major labels in the top ten in the cabinets [supplied to the customers]" and that they were fully aware that this was inconsistent with the pitch they were to give (T.209-210).*

His testimony before the grand jury -- which he char-

*In a revealing colloquy, Mr. Fisher explained why this misrepresentation did not represent fraud:

Q. That's fraud, isn't it? That you're expecting Mr. Joyce or a salesman to go out and cheat the public? Is that [what] you're telling them; yes or no, sir?

A. I wouldn't say it was fraud.

[continued]

acterized as truthful -- showed precisely the opposite:

Q. And were you training the sales force the same way?

A. Yes, sir.

Q. Were you to tell the sales force, as far as training them, what you did with respect to major labels?

A. No.

Q. Just tell them that they got --

A. I didn't tell salesmen that they weren't going to get them. You have to keep that out of the salesman's mind or else he may reiterate it or he don't believe in it, himself.

(T.211-212).

After hearing this testimony, Mr. Fisher mused: "... may not told him" (T.214).

(Footnote continued from the preceding page)

Q. That's not fraud?

A. Because the other tapes would sell, too.

Q. I don't understand you. You sell a man 40 major label tapes and then you only give him ten; that's not fraud?

A. Most of them didn't know what a major label was.

Q. That's what you think?

A. That's right. That's what I thought.

Q. So it didn't make any difference to you, 10 or 40, as long as you make the sale; is that right?

A. That's exactly it.

(T.220-222).

At the conclusion of the Government's case, counsel moved to dismiss the indictment, addressing, inter alia, the Government's failure to prove that Mr. Joyce had conspired with the officers of Mackey Distributors or had "knowingly and willfully participated in any scheme or fraud and knowingly abetted in any conspiracy" (T.260-261). He also addressed the question of whether Mr. Joyce had knowledge of the company's intention to deliver lesser quality merchandise:

There isn't any fact here tying Joyce in with a misrepresentation whatsoever. There isn't any fact where there's any proof that Joyce had knowledge of any fraud.... Joyce was a salesman who was on the road most of the time and did not have any knowledge....

(T.262).

The motion to dismiss was denied (T.262).

C. The Defense's Trial Evidence

Appellant Joseph Joyce had been a salesman for two years before joining Mackey Distributors. His first sales experience was with the LaSalle Extension University, a home study school; then he went to work for Usery Vendors, for whom he sold vending machines; after that, he began selling for the Taylor Business Institute, which offered courses in business management, accounting, and secretarial skills (T.295-302). In these jobs he acquired his sales technique and learned much of the procedures used in these types of distributorships, such as the function of locators and the reliance on the home office for customer contacts (T.303-305). His next job was with View Tape;

this lasted for two and one-half months and was his only experience in tape sales prior to his association with Mackey Distributors (T.295, 301). The operation at View Tape resembled that at Mackey Distributors, with one exception: View Tape offered tapes on the Zodiac label, a minor private label which recorded top artists and paid all royalties required (T.307-308).*

Mr. Joyce noticed an advertisement placed by Mackey Distributors on August 23, 1972, in which they offered major label tapes. This caught his attention because he had learned at View Tape that there was customer resistance to the unknown Zodiac label and demand for major label tapes, and because Jerome Mackey had a substantial reputation; on the chance that they might hire an experienced tape salesman, he called and asked for a job (T.263-264, 312-313). He was invited in for an interview the following day, at which time he met Mr. Fisher (T.265). Mr. Fisher explained that Mackey Distributors was a wholly-owned subsidiary of Jerome Mackey Judo Schools, a highly successful venture, and he provided references for Mackey Distributors which included the Better Business Bureaus of New York and Long Island, an officer of the Franklin National Bank, the company's attorney and accountant, and four satisfied cus-

*The payment of royalties was said to make these tapes legal, though Zodiac may not have been the label for whom the artists usually recorded. Mr. Joyce testified that David Robins, the sales manager at View Tape, gave him a letter indicating that royalties were paid, and that the Zodiac tapes themselves stated that on the packaging (T.308-309).

tomers with whom Mr. Fisher had dealt (T.268, 331). Mr. Joyce later called the Better Business Bureau to check this reference, and he received a report on September 13, 1972 (entered in evidence) indicating that Mackey Distributors was a wholly-owned subsidiary of Jerome Mackey Judo Schools and that there were no complaints against the company (T.269, 334).^{*} Mr. Joyce also called Mr. Belrista, Vice-President of the Franklin National Bank, and was told that Mackey Distributors was a "good company" and that they had "a substantial account" with the bank (T.271).

Mr. Joyce accepted Mr. Fisher's offer of employment and reported for work on August 27, 1972 (T.272). Mr. Fisher explained all the relevant material to him: the subsidiary relationship to Jerome Mackey Judo Schools and that company's financial security, the provisions of the Mackey Distributors contract, the repurchase agreement and addendum to the contract, the projection sheet, and the various papers that were to be given to prospective customers (T.272-273). On the following day, Mr. Joyce sat in on a sales session in which Mr. Fisher spoke to prospective customers; Mr. Fisher told them that they would receive 40 major label tapes, just as he had told Mr. Joyce the day before, and showed them a cabinet containing 40 major label tapes (T.273). The sales supplies he gave Mr.

^{*}Another Better Business Bureau report dated October 1972, which Mr. Joyce received from a customer in late October, showed that there were still no complaints registered (T.335-336).

Joyce a few days later included a cabinet with 40 major label tapes, to be used for display purposes (T.274). Mr. Fisher told Mr. Joyce that he had been in the tape business since 1966 and had access to all the major label tapes in sufficient quantities to satisfy Mackey's customers; he also told Mr. Joyce that Mackey Distributors maintained a warehouse full of tapes. The tapes, which were to retail for \$3.99, \$4.99. and \$5.99, respectively, were provided to the Mackey customers for \$2.00. Mr. Joyce did not recognize this as being an unusually low price since he did not know the wholesale cost of the tapes (T.324-325); he explained:

You have to understand, Mr. Kramer, when I went for that interview I was very, very impressed with everything that man showed me and told me about the company. I see the president of the company is a man who's been in business for 17 years, has very strong assets. Who am I to go into this area, how much do you pay for your tapes wholesale? He wouldn't tell me anyway if I asked. It wasn't any of my concern.

(T.341).

Mr. Joyce's tenure as a salesman for Mackey Distributors ran from September 1 to November 27, 1972 (T.274, 278). His exclusive source of earnings was a straight 15 percent commission on all sales contracts.* As to hotels, meals, travelling expenses, long distance telephone calls, and all other expenses

*Although Mr. Fisher had testified that Mr. Joyce was on a 20 percent commission, Mr. Joyce maintained his lower figure, and offered five checks issued by Mackey Distributors which apparently represented 15 percent of the corresponding contracts (T.267, 282).

incurred in selling the tapes, Mr. Joyce was responsible for the costs out of pocket; there was "no salary, no expenses, no remuneration of any kind" (T.167, 271). The company provided the display cabinet and tapes, all the printed literature that was to be distributed to potential customers, and the newspaper advertisements (T.274).* For the three months he worked for Mackey Distributors, Mr. Joyce grossed \$9,000 and incurred expenses of \$2,000 (T.283). On November 27, 1972, upon returning from a sales trip, Mr. Joyce was advised by Mr. Fisher that Mr. Taylor had resigned after having mismanaged the funds and left the treasury depleted. Mr. Joyce saw Mr. Taylor that evening, and Mr. Taylor confirmed this (T.283-284).**

Mr. Joyce testified that the details of his sales presentation and promises to deliver major label tapes, as related by the Government's four witnesses who had been his customers, were accurate (T.328-330, 337-338). He assured all his customers

*Mr. Joyce's financial self-sufficiency is evident from one incident in which he went to Chicago at Mr. Fisher's request; in four days, he received only one client to interview (which did not conclude in a sale), and despite the fact that he went to Chicago because the company was interested in that region, he paid all expenses, from hotel room to transportation to and from New York (T.275-276).

**This terminated the active operations of the company. At a meeting in his luxurious corporate headquarters a few days later, Mr. Mackey assured all his salespeople that they were going to reestablish the company and make good on all obligations. Mr. Joyce, "impressed from what I saw there," stayed on for a short period and attempted to obtain tapes for the customers. In February 1973, he went to work for Mr. Mackey, selling judo school franchises; he was paid \$200 per week, sold no franchises, and left after about three weeks (T.284-288, 349).

that the only tapes they would receive would be major label and top artist tapes, which is what he had been told, and he qualified the contract provision for "various labels and artists" and being limited to first quality tapes (T.279-280, 329). Mr. Joyce did not attempt to hard-sell a certain number of locations; instead, he accepted the customer's decision (T. 354). He also advised his customers that he had no authority to alter the provisions of the contract, and that if a change was desired, it would have to be approved by the home office. In the case of both Mr. Suk and Mr. Bovey, he called the home office to have an addendum approved, and received permission; the addendum was signed with the contract, although it still had to be accepted by the home office, which had the option of rejecting the contract and disallowing the salesman's commission (T.274-275, 327, 339).^{*} After the contract was signed, Mr. Joyce initiated no further contacts with his customers because he was constantly on the road, he would have been personally responsible for the long-distance telephone expense, and he had provided them -- as he had been instructed to do -- with the telephone number of the home office for all servicing questions (T.277, 305-307). Moreover, he had reason to assume

^{*}Mr. Joyce stated that Mr. Taylor's testimony regarding the Suk addendum (T.127-128) was erroneous; not only did Mr. Taylor not criticize him for having drawn the addendum for top ten Billboard listing tapes (according to Mr. Joyce, Mr. Taylor would still have had the option to reject the contract), but Mr. Taylor approved the addendum through Mr. Fisher, with whom Mr. Joyce spoke (T.327).

that they were satisfied: on every occasion that he called in or returned to the home office, he inquired as to any telephone calls, and neither the receptionist -- a Miss Seria -- nor Mr. Fisher ever gave him any of the messages from disgruntled customers; to the contrary, Mr. Fisher commonly advised him that a customer had called in and expressed satisfaction or required additional merchandise and locations (T.278-280, 323, 332). Mr. Joyce, believing that his customers were happy, even used one -- Mr. Bovey -- as a reference in a later sale to Mr. Stockton; when Mr. Stockton subsequently entered into a contract, Mr. Joyce assumed that Mr. Bovey had given a positive recommendation (T.281).*

D. Excerpts from the Government's Summation
and the Court's Charge**

Throughout summation, the prosecutor attempted to depict Mr. Joyce as a "con man." To offset the limitations of the evidence on this point, the prosecutor often resorted to arguments for which there was no factual support. For example, the argument advanced against Mr. Joyce's statement that he did not know the wholesale cost of tapes or that \$2.00 was too low a

*In fact, Mr. Stockton, like Mr. Bovey, never received satisfactory service or delivery from the company, but Mr. Joyce first learned this well after he had left the company (T.289).

**The complete text of the charge is annexed as C to the separate appendix to appellant's brief; excerpts of the Government's summation are reproduced at appendix D.

figure was the prosecutor's assertion: "Anybody experienced in tapes knew that" (T.372, 382); there was, however, no proof that this was common knowledge in the tape industry or authoritative evidence that \$2.00 was actually too low.* Most notable of the prosecutor's comments were his charges that View Tape, Mr. Joyce's previous employer, had been involved in a "tape scheme," that tapes sold by View Tape were illegal, and that Mr. Joyce was involved in the fraud:

Mr. Fisher had testified about this scheme and it was around for a long time and was very diversified. He mentioned a number of companies, one after another, one identical tape scheme after another. Mr. Joyce was involved in the one at View Tape, keep that in mind....

. . .

... [Mr. Joyce] considered anything which had an artist and a singer on it, a top label, top tune tape. He didn't even consider the tape at View Tape a reproduction, everything legal, everything legitimate.

(T.375, 378).

Two other remarks pertained to a letter which had been admitted into evidence over defense objection showing that Mr.

*Other unsubstantiated assertions include: Mr. Joyce alone made all the sales for Mackey Distributors (T.368-369); Mr. Joyce knew that there would not be delivery of the tapes to his customers within a month (T.366-367); Mr. Joyce knew that the buy-back clause would not be honored (T.367); and Mr. Joyce told Mr. Suk that he knew the references (T.381). Additionally, Mr. Joyce's claim that he used no high pressure tactics was described as "incredible" and his statement that he allowed the customer to determine the size of his order was attacked as "not the truth" (T.379-380), although the customers who testified for the Government confirmed Mr. Joyce's statements.

Joyce, after his resignation from Mackey Distributors, had indicated to a prospective employer that his earnings at Mackey had been \$39,000 and his length of employment 35 weeks. Mr. Joyce readily admitted, even before production of the letter, that he had exaggerated his salary and service, but the letter was received (T.350-351).^{*} In summation, the prosecutor twice commented on Mr. Joyce's exaggeration, asking the jurors to infer not a lack of testimonial credibility by a predisposition to fraud:

Now, Mr. Joyce admitted when he was looking for a job he exaggerated his salary. If he was willing to do that, then what would Mr. Joyce be willing to do to make a sale where he would make 15 per cent....

(T.371-372).

Mr. Joyce, I admit, is a con man and a con man lies. A con man doesn't admit to lying, not to themselves [sic], not to anybody else. Remember when he went to get a job, he grossly exaggerated. He said how much he made, which wasn't true. It was grossly exaggerated. Why should his behavior differ then from when he worked at Mackey.

(T.383).

Mr. Joyce's letter was among the first items requested by the jurors during their deliberations (T.435-436).

The prosecutor was highly critical of Mr. Joyce's reliance on the information provided to him by the company. His argument to the jurors suggested a legal duty of inquiry far

^{*}The court ruled: "Credibility is an issue and that is the whole issue whether he exaggerated to the point of being a fraud" (T.351).

higher than any recognized in law. For instance, he stated:

We all know what the Better Business Bureau is. Of course, they get a good reference according to the bank for Jerome Mackey, and he's not going to turn up any great knowledge either. Try to think what else Mr. Joyce did to find out what was going on. Did he contact any of the references? Did he contact any of the other distributors. Did he look at the track records and actually look at the purchase orders they put in, not a thing. Did he ask to see the tapes?

(T.373-374; see also 380, 383).*

The Government concededly had attempted to prove Mr. Joyce's knowledge by circumstantial evidence (e.g., T.370-371). In his charge to the jury, Judge Weinstein did not mention circumstantial evidence and did not define for the jury the standard by which circumstantial evidence was to be evaluated. The only instruction conceivably on point was:

The act and the state of mind of this defendant has to be inferred from what you heard here and from the various records that you have.

(T.426).

E. Verdict and Sentence

The jurors deliberated all day on March 11, 1976, without reaching a verdict; on March 12, they reached the following verdict: As to the three counts of mail fraud pertaining to

*No exception was entered to any of these remarks. Judge Weinstein did not charge the jurors that the summation arguments of counsel were not evidence.

the mailing of newspaper advertisements -- not guilty as to The Boston Globe advertisement (Count One), not guilty as to The Utica Press advertisement (Count Two), guilty as to The Philadelphia Inquirer advertisement (Count Three); as to the two counts of mail fraud pertaining to the mailing of checks -- guilty as to the mailing from Quincy, Massachusetts (Count Four), guilty as to the mailing from New York Mills, New York (Count Five); as to the single count of transporting in interstate commerce a fraudulently obtained check -- guilty (Count Six) (Minutes of March 12, 1976, at 3).

Mr. Joyce failed to appear for his sentencing date, and a bench warrant was issued. After a year as a fugitive, Mr. Joyce surrendered. At sentencing on July 20, 1977, Mr. Joyce, who had no prior criminal involvement and whose education reached only the ninth grade level, was sentenced to five years, to be served as a split sentence -- six months in jail and the balance on probation (Minutes of July 20, 1977, at 7-8).

ARGUMENT

Point I

THE EVIDENCE WAS INSUFFICIENT TO SUPPORT THE INFERENCE THAT APPELLANT JOYCE, A SALESMAN IN A CORPORATION WHICH OPERATED IN A FRAUDULENT MANNER, HAD KNOWLEDGE OF THE FRAUDULENT SCHEME AND WAS A KNOWING PARTICIPANT.

That Mr. Joyce performed a vital function for the fraudulent Mackey Distributors is not in issue, nor is the existence of an illegal scheme to deceive customers formulated by the officers of this corporation. But viewing the evidence, including the defense proof, most favorably to the Government,* the case against Mr. Joyce, despite the testimony of two of the four corporate officials responsible for this fraud, fails to establish facts from which an inference of knowledge on the part of Mr. Joyce may be inferred. By all accounts, Mr. Joyce was a good salesman, presenting prospective customers with all the information provided to him by the company. But that he gave his sales presentation with the slightest suspicion that the company would not honor the contract commitments is unproven and, upon the facts adduced, inconceivable.

Conviction for the acts alleged or for aiding and abetting those acts required knowledge of the illegal venture and knowing participation designed to advance the fraud. See Nye

*See Glasser v. United States, 315 U.S. 60, 80 (1942); United States v. Johnson, 513 F.2d 819, 821 (2d Cir. 1975).

& Nissen v. United States, 336 U.S. 613, 619 (1949), citing United States v. Peoni, 100 F.2d 401, 402 (2d Cir. 1938) (L. Hand, J.); United States v. DiStefano, 555 F.2d 1094, 1103-1104 (2d Cir. 1977); United States v. Mariani, 539 F.2d 915, 919 (2d Cir. 1976); cf. United States v. Cirillo, 499 F.2d 872, 883 (2d Cir.), cert. denied, 419 U.S. 1056 (1974). Neither direct nor circumstantial evidence at trial proves that Mr. Joyce had any knowledge of the fraud or was knowingly associated with the scheme, and his conviction as an active participant or as an aider and abettor may not stand.

While the record fails to prove whether Mackey Distributors was conceived in fraud on April 19, 1972 by Richard Taylor, or was later converted to fraud in late July by Lester Fisher, it is undisputed that Mr. Joyce was not associated with the company and had no part in formulating the scheme. He joined the company after reading the same type of advertisement -- major label tapes -- which was to attract all the victims, and when he began his sales operations in September, he assumed a function which was both exceedingly narrow and highly controlled.

Mr. Joyce's role in the corporation was narrow in that the prescribed sales procedure made no provision for continuing contact with customers, and effectively isolated the salesman from the operation of the company. Mr. Joyce, exclusively a traveling salesman, had no office, no secretary, no telephone. Once he obtained payment from a customer, it was company policy that he have no further contact with that per-

son, but instead, that he direct the customer to the home office; and aside from Mr. Joyce's obligation to comply with this policy, there were the practical difficulties relating to his being on the road and the cost of long-distance telephone calls. Nor did the company keep him apprised of its dealings with his customers. Apart from Mr. Joyce's testimony that Mr. Fisher repeatedly (and inaccurately) assured him that his customers were satisfied and that he had received no telephone messages at the home office, Mr. Taylor, the officer who took all the complaints, indicated that he spoke to Mr. Joyce only once during the entire period of Mr. Joyce's employ, and on that occasion not to communicate a customer's complaint but his own. It was the design of this fraud to make promises the company would never honor, and to accomplish this, someone had to make the promise; this was the function -- and the only function -- of sales personnel such as Mr. Joyce.

Equally, Mr. Joyce's conduct was closely controlled in that his sales presentation was dictated by the company. A salesman was taught the Mackey sales pitch by rote; he was trained with the "pitch book" -- the collection of articles, financial reports, references, and other materials -- prepared by Mr. Taylor and Mr. Fisher, and then taken to watch Mr. Fisher pitch a customer, with the instruction that his own sales presentation should mimic "what he heard me [Mr. Fisher] say." Essential to the fraudulent scheme was the

signing of a large number of customers in a short period of time, and the company relied on the attractiveness of its offer to obtain these customers. Salesmen such as Mr. Joyce served this objective by repeating a planned and uniform sales presentation.

Mr. Joyce, therefore, had a role in this scheme so limited in scope and demand as to render his knowledge of the fraud not merely unnecessary but undesirable. There was nothing inherently fraudulent about Mr. Joyce's representations; the fraud grew from the agreement not to abide by those representations -- not to deliver the specified tapes and cabinets -- a function from which a salesman in this company was well isolated. It was Mr. Fisher, in grand jury testimony which he embraced as truthful at trial, who provided the explanation for maintaining so narrow and controlled a sales staff: "You have to keep [the fraud] out of the salesman's mind or else he may reiterate it or he don't believe in it himself." It was necessary to the success of the scheme that the salesmen do nothing more than feed the prepared line to prospective customers, and it was necessary to the effectiveness of their presentation that the salesmen be kept ignorant that their promises would not be fulfilled. It is for this reason that Mr. Taylor advised Mr. Mackey to hire Mr. Fisher because he would make misrepresentations "to people in the field" -- he would lie to the salesmen.

Mr. Joyce's role in this fraud was limited in another

significant way: financial gain. Both Mr. Fisher and Mr. Taylor received substantial compensation from the company* and had the privilege of placing family members in the business,** and Mr. Taylor was given the additional benefit of an exclusive contract for supplying tapes to Mackey Distributors through his two corporations. While the gains realized by Mr. Mackey and Mr. Nelson are not a matter of record, it is notable that at least \$300,000 passed through the corporate coffers before disappearing. Mr. Joyce shared in none of this fraudulently obtained prosperity. He earned a 15 or 20 percent commission on his own sales and was paid no salary or reimbursement for business expenses such as travel, food, or lodging; after three months of constant traveling, he earned \$9,000 and incurred expenses of \$2,000. These earnings were not bad, but they are not out of line with the earnings an effective salesman can make in a legitimate concern; and when the brief life of Mackey Distributors was over and the fraud uncovered, Mr. Joyce was out of a job with his reputation tainted by his association with Mackey. Unlike Mr. Taylor and Mr. Fisher and the other

*Mr. Taylor received \$1,500 per month tax free (the corporation paid his taxes) and all expenses. Mr. Fisher received a commission of 25 percent on all his sales and five percent on all salesmen's sales, and all expenses. There was no specific figure mentioned as to Mr. Taylor's total earnings, although there was innuendo that he enjoyed some or all of \$300,000 of corporate funds. Mr. Fisher's earnings were not shown either, but the records admitted below indicated that his income had resulted in a tax of \$22,000.

**Mr. Taylor hired his brother and son as salesmen, and extended "advances" to them. Mr. Fisher hired his wife as one of the "singers."

villains in this scheme, Mr. Joyce had "no stake in the venture" (United States v. Johnson, 513 F.2d 819, 823 (2d Cir. 1975)).

These indications that Mr. Joyce had no knowledge of the fraudulent scheme and was not a knowing participant in it are not met by evidence showing the contrary. Neither Mr. Fisher nor Mr. Taylor, the only sources by which Mr. Joyce would have learned directly of the fraud, made a distinct allegation that Mr. Joyce was told or expressed knowledge of the fraudulent intentions of Mackey Distributors,* and no witness provided other direct evidence reflecting Mr. Joyce's knowledge; moreover, although the Government's case could rest exclusively on circumstantial evidence (see United States v. Manfredi, 488 F.2d 588 (2d Cir. 1973), cert. denied, 417 U.S. 936 (1974)), no such evidence supported an unequivocal inference that Mr. Joyce possessed knowledge of the scheme (cf. United States v. Infanti (Kurtz), 474 F.2d 522, 527 (2d Cir. 1973)).

*Mr. Fisher testified at one point that he was "almost positive" that he told Mr. Joyce that the customers would get only 10 major label tapes out of 40 ordered; but then he revealed that he had no distinct recollection of so advising Mr. Joyce but only of "tell[ing] it to all the salesmen." This testimony was rendered effectively useless when Mr. Fisher characterized as true his grand jury testimony that none of the salesmen was told of this aspect of the scheme and that such silence was necessary to permit the salesmen to accomplish their appointed purpose. Mr. Fisher also stated: "[I] may not [have] told him" (T.210-214).

One argument advanced by the Government was that Mr. Joyce had knowledge of the fraud because he knew that the \$2.00 cost to customers for major label tapes was too low. As substantiation for this argument, the prosecutor offered only his own conclusion, "Anybody experienced in tapes knew that." This assertion, unsupported by any evidence whatsoever, was a questionable speculation, for a salesman at Mackey Distributors, whose function was so narrowly restricted and who had no role in determining prices and profit margins, would probably have had no familiarity with the wholesale costs of tape recordings.* It is instructive to note that Mr. Bovey, who had made an exhaustive investigation of the tape business, apparently concluded that the tapes could profitably be supplied at \$2.00, for he -- unusually cautious because of a previous swindle -- signed with Mackey Distributors with the expectation that the contract would be honored.

Moreover, Mr. Joyce had more substantial reasons for believing that the specified tapes would be delivered for \$2.00 as promised. Unlike the practice at View Tape (his previous employer), Mackey Distributors made express reference to major labels and top artists in its newspaper advertisements, and Mr. Joyce had witnessed Mr. Fisher informing a prospective customer that only major label tapes would be provided. Mr.

*Mr. Joyce testified that he had not been aware of the wholesale cost of tapes; he did not inquire because he believed the company would not have provided him with the information had he inquired -- "It wasn't any of my concern."

Joyce also was aware that the addendum to the Bovey contract, which explicitly specified only major labels and top artists, was approved by the home office, and the 40 display tapes he was given for use in his sales presentation were all major labels and top artists. These facts constitute circumstantial proof that Mr. Joyce had greater reason to believe than not to believe that the tapes he promised would be delivered by the company.

Another argument advanced by the Government is that Mr. Joyce was culpable because he failed to make reasonable inquiries into the company's operations. The prosecutor charged:

Try to think what else Mr. Joyce did to find out what was going on. Did he contact any of the references? Did he contact any of the other distributors? Did he look at the track records and actually look at the purchase orders they put in, not a thing. Did he ask to see the tapes?

Under United States v. Bright, 517 F.2d 584 (2d Cir. 1975), one factor going to knowledge of illegality is a conscious and purposeful avoidance of the truth. The prosecutor's argument addresses not the avoidance of truth but the entirely different obligation of affirmative inquiry. While the law recognizes various duties of inquiry, we have found none that requires a salesman to conduct so exacting an examination of the corporation for which he works as this prosecutor demanded of Mr. Joyce.

But the most substantial failing of this argument is it once again suggests an inference of guilty knowledge by neglecting facts which would establish a stronger inference of a jus-

tifiable lack of knowledge. Mr. Joyce took significant steps "to find out what was going on," and the information before him showed that Mackey Distributors was a sound company: Jerome Mackey, the company's chief executive, had a highly respected reputation as an established and successful entrepreneur with substantial wealth, and his major enterprise, Jerome Mackey Judo Schools, said to be the parent company to Mackey Distributors, was a multi-million dollar operation; periodic reports of the Better Business Bureau, obtained by Mr. Joyce before and during his employ, indicated that there were no reported complaints against Mackey Distributors and confirmed that this company was a wholly-owned subsidiary of Jerome Mackey Judo Schools; and Mr. Belrista, Vice-President of the Franklin National Bank, where Mackey Distributors held its bank account, related to Mr. Joyce that Mackey Distributors was a "good company" with a "substantial account." Mr. Joyce was not responsible in accepting employment with Mackey Distributors; he, like the company's sales victims, was taken in by an elaborate front, and nothing short of clairvoyance would have led Mr. Joyce to a recognition of the company's true character.

This record allows but one conclusion: Mr. Joyce was kept ignorant of the fraud so that he could make his sales presentation with enthusiasm and a clear conscience, never knowing that his statements and promises would not be honored. This is borne out by several of the customers: Mr. Melleody described Mr. Joyce as "very gracious" and "very congenial,"

and Mr. Bovey repeated these sentiments and agreed that Mr. Joyce's belief in the product appeared "sincere and honest." That several jurors failed to see this -- the verdict appears to be a classic compromise -- is not on account of the evidence, but must be attributed to the prosecutor's many distortions of the evidence (see Point II) and the court's failure to charge on circumstantial evidence (see Point III). Regrettably, the grossly unfair and unsubstantiated guilty verdict has created another victim of Mackey Distributors.

Point II

APPELLANT JOYCE WAS DEPRIVED OF A FAIR TRIAL BY THE PROSECUTOR'S EFFORT TO DEPICT HIM AS A "CON MAN" THROUGH UNSUBSTANTIATED CHARGES OF SIMILAR MISCONDUCT AND IMPROPER ARGUMENT DESIGNED TO PROVE CRIMINAL PROPENSITY.

Because the evidence was so weak, the prosecutor was obliged to turn to another source to argue his case. The tactic adopted was character assault, the depiction of Mr. Joyce as a "con man." The prosecutor's summation contained a number of unsubstantiated accusations designed to build this characterization, but two of his arguments were so inflammatory as to sway the jurors to a guilty verdict despite the lack of evidence. If this case is not reversed on the ground of insufficiency of the evidence, then a new trial should be ordered on account of the prosecutor's improper summation arguments.

The first of these comments was the accusation that Mr. Joyce had previously engaged in a fraudulent tape scheme at View Tape, where Mr. Joyce had worked for two and one-half months prior to joining the sales staff at Mackey Distributors. No evidence supported these allegations. There was no proof that View Tape had engaged in a scheme like Mackey's or had failed to deliver the tapes promised; View Tape, in distinction to Mackey Distributors, did not advertise major label tapes, and would have met its contractual commitments by delivering Zodiac tapes. There was no proof that View Tape distributed illegal tapes, as intimated by the prosecutor; the only evidence at trial was Mr. Joyce's testimony that View Tape sold only legally obtained tapes, for which all royalties had been paid. And there was no proof that, even if View Tape had been the most corrupt operation in the East, Mr. Joyce was "involved" in the fraudulent scheme; he was certainly never charged with any criminal activity and no prior act evidence was offered by the Government.

The prosecutor's statements constituted blatant misrepresentations of the evidence, requiring reversal (United States v. Drummond, 481 F.2d 62, 64 (2d Cir. 1973)). In United States v. Guglielmini, 384 F.2d 602, 606 (2d Cir. 1967), this Court was critical of the prosecutor's "improper and unfair" argument that the defendant had learned "this scheme" in a prior job where, as here, the defendant had not been prosecuted for a

prior fraud.* This Court noted:

As the principal issue in the case was the intent of the defendants, it is clear that permitting the intrusion of this irrelevant matter, which involved nothing more than Frank Guglielmini's employment by someone who was later tried for bankruptcy fraud, was a substantial error. The strong inference of guilty knowledge which the prosecutor's argument communicated to the jury could well have been a factor in their finding Guglielmini guilty.

Ibid., citations omitted.

See also United States v. Cirami, 510 F.2d 69, 73 n.2 (2d Cir. 1975) (improper to assert prejudicial facts not in evidence); United States v. Lefkowitz, 284 F.2d 310, 314 (2d Cir. 1960) (improper to suggest Government aware of other criminal incidents). Proof of a prior similar act or crime is admissible (F.R.Ev. 404(b)) precisely because it may have direct bearing on such elements as knowledge; that the prior act of fraud was nothing more than the prosecutor's unsubstantiated allegation would not reduce its probative impact on the jury, who would consider this imaginary crime as proof of Mr. Joyce's knowledge of the instant fraud. An identical impropriety in summation was the basis for reversal in United States v. Martinez (Stephens), 514 F.2d 334, 342 (9th Cir. 1975), where the court stated:

*Moreover, here, in distinction to Guglielmini, there was no proof that anyone was prosecuted for a prior fraud, making the prosecutor's argument against Mr. Joyce even more unjustified.

The crucial issue in the case against [Stephens] ... was his knowledge.... Prior involvement could well persuade a jury to draw an inference of knowledge as to each of these matters. There was no evidence of such involvement....

Id., 514 F.2d at 343.

The prejudicial effect of this misrepresentation was extended by the prosecutor's attempt to establish Mr. Joyce's criminal propensity by attacking his character. A letter written by Mr. Joyce to a prospective employer exaggerating his earnings at Mackey Distributors had been admitted in evidence; the Government never contended that the recitations in the letter were true, and it appears that the letter was offered and received as a prior inconsistent statement.* Nevertheless, this letter was the basis for the prosecutor's argument, on two separate occasions, that Mr. Joyce's predisposition to fraud established his guilt of the crime in

*The admission of the letter, as opposed to Mr. Joyce's testimony alone on his prior statement, appears to have been improper under F.R.Ev. 608(b) and 615(b). Moreover, the court's ruling on the letter's admissibility, though referring to the letter's relevance to Mr. Joyce's credibility as a witness, was somewhat ambiguous ("Credibility is an issue and that is the whole issue whether he exaggerated to the point of being a fraud"). Finally, it is submitted that the entire matter should have been barred from cross-examination as unduly prejudicial despite relevance to the question of credibility, F.R.Ev. 403, or at least been accompanied by an instruction limiting the subject to credibility. These issues are not separately raised, however, because the prosecutor's comment and misuse of the letter was error of such greater magnitude. At most, Mr. Joyce's statement was admissible as a prior inconsistent statement reflecting on his testimonial qualities; the prosecutor used it to prove that Mr. Joyce was an unsavory character predisposed to commit fraud, a misuse beyond any that could have been imagined by the jurors alone.

question:

Now, Mr. Joyce admitted when he was looking for a job he exaggerated his salary. If he was willing to do that, then what would Mr. Joyce be willing to do to make a sale where he would make 15 per cent....

(T.371-372).

Mr. Joyce, I submit, is a con man and a con man lies. A con man doesn't admit to lying, not to themselves, not to anybody else. Remember when he went to get a job, he grossly exaggerated. He said how much he made, which wasn't true. It was grossly exaggerated. Why should his behavior differ then from when he worked at Mackey.

(T.383).

These arguments went well beyond the legitimate use of the letter, cf. Dunn v. United States, 307 F.2d 883, 887-888 (5th Cir. 1962), raising arguments concerning Mr. Joyce's character which had not been put in issue. As a result, the jury's attention was diverted from their obligation to determine whether the evidence established Mr. Joyce's guilt.

Michelson v. United States, 335 U.S. 469, 476 (1948), recognized that character evidence could inject confusion, unfair surprise, and undue prejudice into a case, and that the Government may not initiate an affirmative attack on a defendant's character. That this argument went to the impermissible issue of character and not to a relevant matter is evident upon consideration of F.R.Ev. 404(b). The general rule -- "evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith" -- is qualified by the provision that

such evidence is admissible to prove "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Here, the letter sought employment at another company and had nothing to do with the operations of Mackey Distributors. By no construct of the imagination can Mr. Joyce's letter be viewed as bearing on any of the specified issues, such as his knowledge; it was used exclusively to demonstrate a character which would participate in a fraudulent scheme.* This Court has held it to be error for the Government, in summation, to make the defendant's character the issue upon which the verdict turns; as Judge Lumbard stated in United States v. Bugros, 304 F.2d 177, 179 (2d Cir. 1962):

We cannot condone the deliberate and unnecessary reference to an immaterial detail. The nature of the prosecutor's references showed that his purpose could only have been to suggest that the defendant was a contemptible person.... The unfair, unwarranted, and reprehensible summation deprived the defendant of the fair trial which is his right....

Cf. Hall v. United States, 419 F.2d 582, 585 (5th Cir. 1962) (attack based on a separate criminal offense).

The two cited incidents of prosecutorial misconduct were particularly serious, for both were designed to convince the jury that Mr. Joyce was, by experience and nature, a "con man," and both proceeded from premises which were unsound: the first,

*In truth, the letter did not prove Mr. Joyce's inclination toward criminal fraud; his exaggeration was of the type commonly encouraged by employment counselors, and did not entail the moral depravity and callousness which permits a person to inflict the type of economic injury involved in fraud.

the factual misrepresentation that Mr. Joyce had previous experience in this fraudulent scheme; the second, the inflammatory misrepresentation that Mr. Joyce was of a nature to participate in a fraudulent scheme. The evidence in this case was meager, and this summation may well have been the basis of the jury's verdict. Consequently, the prosecutor's comments should be deemed plain error, and counsel's failure to except to these unjustifiable arguments, though inexcusable, should not stand in the way of the proper remedy at this juncture.

Point III

THE COURT'S FAILURE TO EXPLAIN THE MEANING AND EVALUATION OF CIRCUMSTANTIAL EVIDENCE IN ITS JURY CHARGE CONSTITUTED PLAIN ERROR.

The Government's case, as the prosecutor acknowledged, was constructed on circumstantial evidence. If, contrary to Point I, there was any conceivable basis for a finding of guilty knowledge, that basis was in circumstantial evidence, for no witness unequivocally stated that Mr. Joyce was told of the fraud or evinced knowledge of the fraud through his own statements. Yet the court below failed to explain the meaning and evaluation of circumstantial evidence in its charge;* and in place

*This defect in the charge is distinct from the failure to give the "two inferences" instruction, which has long been discredited. See Holland v. United States, 348 U.S. 121, 139-140 (1954); United States v. Warren, 453 F.2d 738, 745 (2d Cir. 1972); United States v. Siragusa, 450 F.2d 592, 596 (2d Cir. 1971); United States v. Botsch, 364 F.2d 542, 550 (2d Cir. 1966).

of such an instruction, the court said only that "the state of mind of [Mr. Joyce] has to be inferred from what you heard here" without any definition of an inference. Consequently, the jury proceeded to consider the evidence without understanding the proper perspective from which to examine it.

The charge was inadequate because the jury was not advised that circumstantial evidence was evidence of a collateral fact which had itself been proved by direct evidence and which could be used to prove a fact in issue only by a deduction or conclusion grounded in reason and common sense. See United States v. Clark, 475 F.2d 240, 250 (2d Cir. 1973), citing Mathes, Jury Instructions and Forms for Federal Criminal Cases, 27 F.R.D. 39, 51 (1960).*

The danger that the jury would draw an inference from an unproved fact or would move to the fact in issue by guesswork rather than by true deductive reasoning was substantial in this case. The prosecutor's arguments that Mr. Joyce's knowledge of the fraudulent scheme was established by his awareness of the wholesale cost of tapes or by his acquaintance with Mr. Fisher's wife, to name but a few, were not sound; they proceeded from unproved facts and involved guesswork. The jury, however, was not given sufficient instructions on the meaning and evaluation

*This Court quoted the following language from Mathes:

An inference is a deduction or conclusion which by reason and common sense lead the jury to draw from facts which have been proved.

of circumstantial evidence -- nor on the method of inference by which this evidence was to be assessed -- to permit them to consider these arguments pursuant to the proper standards. As a result, evidence of minimal probative value may have been accorded substantial weight.

The error at bar is analogous to that considered in United States v. Clark, supra, 475 F.2d at 248-251. There, the trial court had charged in a manner that suggested that circumstantial evidence need only "indicate" the existence of the essential element of guilty knowledge. This Court commented:

Since there was no direct evidence that appellant knew that the contents of the handbag included the narcotics, and he in fact testified that he did not, it was especially important that the jury be properly instructed on how to evaluate circumstantial evidence. The court's instruction on the subject cannot, therefore, be treated as harmless error.

Id., 475 F.2d at 250.

And this Court went on to criticize the trial judge's instruction on inferences for "fail[ing] to define what an inference is." Ibid. See also United States v. Fields, 466 F.2d 119, 120 (2d Cir. 1972).

The case at bar bears another similarity to both Clark and Fields: the error in the circumstantial evidence charge was not excepted to by defense counsel.* In both these cases, however,

*Note that, with Mr. Joyce's consent, an associate of defense counsel was present during the court's charge in place of counsel, who was ill. This may partially explain the absence of any exception, though the draft of the court's charge had been made available to counsel a few days before, at which time he made no exceptions or requests (T.360).

this Court found "plain error ... affecting substantial rights." F.R.Cr.P. 52(b). In particular, in Fields, the Court so ruled despite substantial evidence of guilt:

We regret the need for a new trial because the evidence of the guilt of these defendants was substantial [footnote omitted], but we do not see how we can fairly follow any other course. This is not, after all, a case of nit-picking over nuances in a judge's charge; the errors go directly to a defendant's right to have the jury told what crimes he is actually being tried for and what the essential elements of those crimes are.

United States v. Fields, supra,
466 F.2d at 121.

A fortiori, the failure to charge adequately on circumstantial evidence should be deemed plain error here, where the evidence of guilt was, at most, minute.*

*The court's charge on conscious avoidance of the truth as bearing on knowledge (T.425-426) is believed to have been error in that, by an inappropriate juxtaposition, the court suggested that deliberate ignorance was adequate to sustain a conviction despite actual lack of knowledge. See United States v. Bright, 517 F.2d 584 (2d Cir. 1975). On this point, however, counsel did not merely fail to register his exception; he affirmatively expressed his preference for the court's questionable wording (T.361). This inexplicable action, which precludes us from advancing this point as plain error, demonstrates that counsel's failures to except to the above errors was not a matter of strategy.

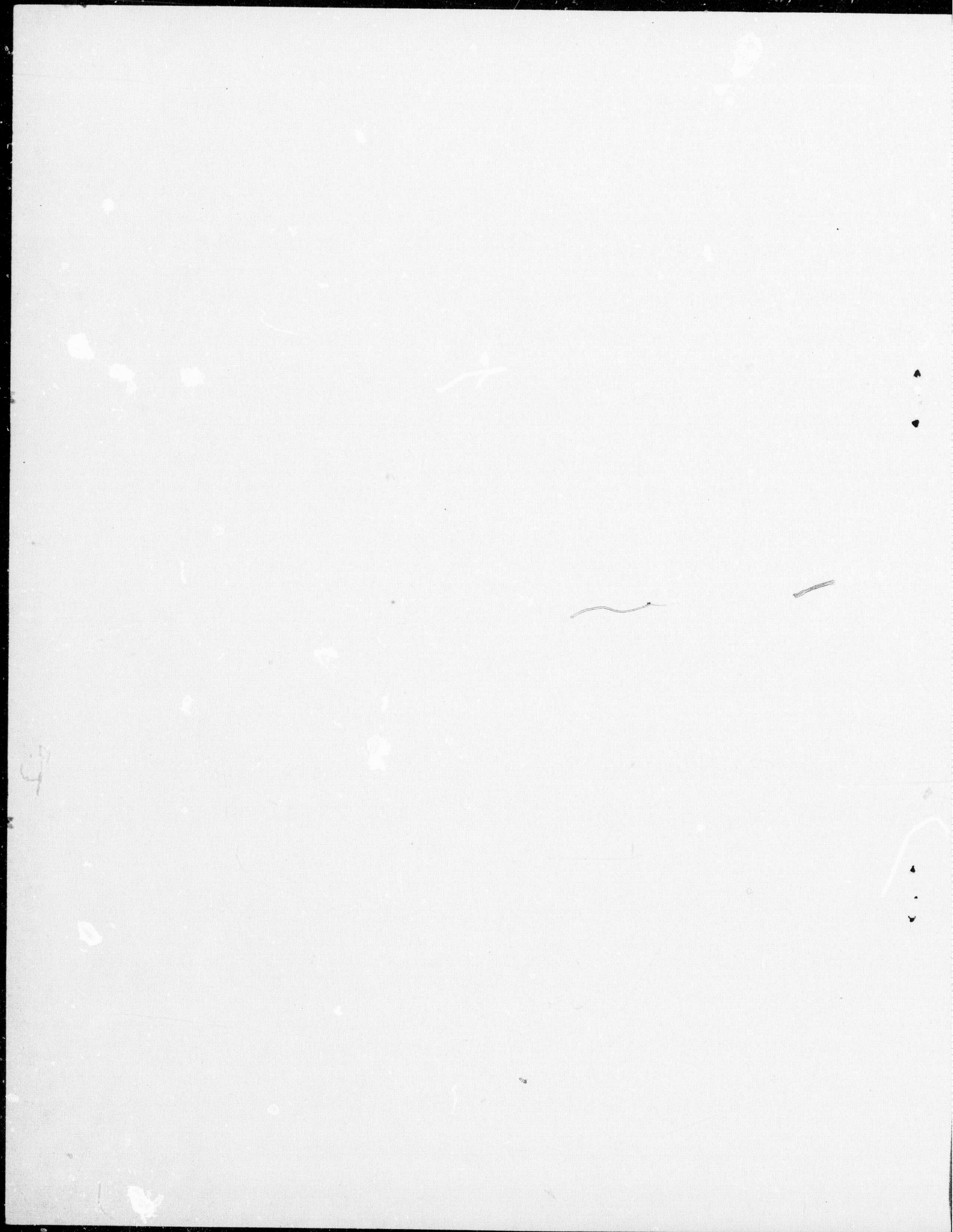
CONCLUSION

For the foregoing reasons, the judgment of the district court should be reversed and the indictment as to appellant Joseph Joyce dismissed; alternatively, the judgment of the district court should be reversed and a new trial ordered.

Respectfully submitted,

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CERTIFICATE OF SERVICE

October 28, 1977

I hereby certify that a copy of this brief and appendix has been mailed to the United States Attorney for the Eastern District of New York.

Stanley J. Dancer